

NTBS Order No.
EM-90

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 15th day of September, 1981

JOHN B. HAYES, Commandant, United States Coast Guard,

vs.

DANIEL W. CLUFF, APPELLANT.

Docket No. ME-84

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a probationary suspension of his license No.457718. The license authorizes appellant to pilot vessels on the Delaware River and the Chesapeake and Delaware Canal. He also holds a state pilot's commission issued by the Navigation Commission for the Delaware River and its Navigable Tributaries, an agency of the Commonwealth of Pennsylvania.

On March 2, 1979, appellant boarded the M/V MOSEL, a vessel of German registry, at the mouth of the Delaware River. The vessel proceeded up the river and into the Chesapeake and Delaware Canal, bound for the port of Baltimore.¹ After the MOSEL had travelled approximately a mile along the canal to the Reedy Point Bridge, where the charted vertical clearance is 135 feet, a raised cargo loading boom on the vessel struck and damaged the main span superstructure of the bridge. As a result of this incident, appellant was charged with negligence by the Coast Guard. He, in turn, claimed that his performance as the pilot of the MOSEL was a matter under the exclusive jurisdiction of the State of

¹Pilotage in the canal, which crosses the States of Delaware and Maryland to Chesapeake Bay, is provided by The Pilots Association For the Bay and River Delaware(whose membership consists of pilots commissioned by the States of Delaware and Pennsylvania) and the Association of Maryland Pilots within the respective States. Vessels transiting in either direction change pilots at Chesapeake City, Md., located some 13 miles west of the Delaware River entrance. U.S. Coast Pilot 3 (18th ed., July 1980) at p. 130.

Pennsylvania and moved to dismiss the charge.

The law judge found federal jurisdiction in Coast Guard regulation 46 CFR 5.01-35(a), which provides that a person "is considered to be acting under the authority of a [federal] license...when the holding of such license...is required by law or regulation or is required in fact as a condition of employment". He found that appellant was required to have a Coast Guard license "as a condition of his employment in the said Canal..." by regulations promulgated by the U.S. Army Corps of Engineers (I.D. 51);² and that jurisdiction was thus vested in the Coast Guard even in the face of appellant's assertion that he was a compulsory state pilot on the MOSEL.²

In deciding the merits of the case, the law judge found that the pilot was responsible for the vessel's safe passage under the charted obstructions, and for assuring that its deck gear was lowered to the height of the mast in compliance with the canal regulations.³ He therefore found appellant negligent as charged, and ordered the suspension of his license for 3 months on 12 months' probation. The initial decision of the law judge was affirmed in all essential respects on appeal to the Commandant (Appeal No. 2236).⁴

²The canal regulations, promulgated under the authority of 33 U.S.C. 1, are set forth in 33 CFR 207.100. Subsection (t) thereof uniquely provides that "any pilot who pilots in the canal shall comply with State laws or Coast Guard regulations and must be licensed for this waterway by the Coast Guard".

^{2a}The Coast Guard contended that appellant's Pennsylvania commission as a pilot was not operative in the Delaware portion of the Canal since it is a waterway entirely within the latter State. It also argued that in fact there had been no assertion of State pilotage jurisdiction in the Canal by either Delaware or Pennsylvania. The record supports the law judge's rejection of these arguments.

³Subsection (f) 33 CFR 207.100 provides, in pertinent part, that "Vessels carrying rods, poles, or other gear extending above the top of the vessel's mast will be required to lower such equipment to a level with the top of the mast before entering the waterway".

⁴Copies of the decisions of the Vice Commandant (acting by a delegation in 33 CFR 1.01-40) and the law judge are attached.

The threshold question presented on appeal herein is whether appellant was serving pursuant to his Coast Guard license or whether he was engaged in pilotage exclusively regulated by the state, and reserved to the states federal law. Plenary regulation of pilotage resides in the states except where preempted by Congress.⁵ The only currently operative statutory exceptions to 46 U.S.C. 211 require Coast Guard-licensed pilots on American merchant vessels not sailing under register except on the high seas (46 U.S.C. 364), and provide for a federal system of pilotage on the Great Lakes (46 U.S.C. 212-216i).⁶ It follows that, apart from the Great Lakes, regulation of pilots on foreign vessels (as well as American vessels operating under register) remains with the states unless 33 CFR 207.100 constitutes a further exception.

Federal courts have overturned enforcement actions by the Coast Guard against state pilots of foreign flag vessels in Soriano v. United States, 494 F.2d 681 (9 Cir. 1974); and Dietz v. Siler, 414 F. Supp. 1105 (E.D.La. 1976). In the Soriano case it was held that the Coast Guard's condition-if-employment regulation,⁷ as applied to a pilot concededly operating under his state commission, infringes upon an area specifically reserved to the states by 46 U.S.C. 211, and is therefore void. It was held in the Dietz case, in effect, that 46 U.S.C. 239, containing the Coast Guard's basic authority to conduct enforcement proceedings, does not include "cases in which one is acting under authority of his state

⁵The general policy reflected in 46 U.S.C. 211, originally enacted in 1789, is that "until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose".

⁶Section 105(a) of the Ports and Waterways Safety Act of 1972 authorizes the Secretary of the department in which the Coast Guard is operating to "require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved". This authority has not been implemented by regulation.

⁷The regulation cited was 46 CFR 137.01-35(a). It is now 46 CFR 5.01-35(a), due to the subsequent transfer (without substantive change) of Part 137 regulations to Part 5. See 39 Fed. Reg. 33322, September 17, 1974.

license".⁸ Appellant contends that these judicial precedents are controlling here.

The law judge distinguished Soriano by finding that the instant condition of employment was not related to the state commission, as there, but was part of a "pervasive federal scheme of control" established by the Corps of Engineers regulations (I.D. 34).⁹ That doctrine was also the basis for the Commandant's conclusion that appellant "was acting pursuant to his Coast Guard issued license" (C.D.5). To be preemptive, the regulatory scheme must be "so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it".¹⁰ By their own terms the Chesapeake and Delaware Canal regulations recognize that state law is operative within the canal. The law judge properly concluded that pilotage jurisdiction had not been preempted by the canal regulations. Thus, we agree with his finding that the Coast Guard had no more than concurrent authority with the state. In the light of the rule of law enunciated by the courts that have addressed this question that there is no concurrent federal control over pilotage regulated by states, the Coast Guard had no jurisdiction. The Dietz case concludes by stating that the "jurisdictional limitations...are imposed by the express mandate of section 239 [46 U.S.C. 239]. Thus retained is the traditional right of each state to enforce the standards of state pilotage laws as to acts under state licenses, free of the

⁸Dietz, supra, at 1111.

⁹Under 33 U.S.C, 1 the Secretary of the Army has comprehensive authority to promulgate regulations regarding the navigation of navigable waters"...for the protection of...operations of the United States in channel improvement..." The statute does not expressly authorize pilotage regulations. Such regulations may nevertheless be within the fair reach of the statute and a valid exercise of federal authority. Insofar as the regulations would in any way limit state pilotage, however, the specific provisions of 46 U.S.C. 211 would be overriding as against a general grant of authority to the Secretary of the Army. If the Congress intended to confer regulatory authority to deal with pilotage in any way impinging on state authority it knows how to do it. See footnotes 6, supra.

¹⁰Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 98, 5. Ct. 988,994,55 L.Ed. 2d 179 (1978); citing Rice v. Santa Fe Elevator Corp., 331, U.S. 218, 67 5. Ct. 1146, 91 L.Ed 1447 (1947);Pennsylvania R. Co. v. Public Service Comm'n, 250 U.S. 556, 40 S.Ct. 36, 63 L. Ed 1142 (1919); and Cloverleaf Butler Co. v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L.Ed. 754 (1941).

possibility that the same acts will be subject to sanction under federal law".¹¹

The clear import of that decision ought not to be misinterpreted or watered down by rationalizations. It is simply that the devision between federal and state pilotage authority makes a pilot amenable to the jurisdiction of the licensing authority that regulates pilotage for the vessel he is piloting at a given time, but not both authorities at the same time. The rule cannot be questioned either on grounds of fairness or the intent of Congress expressed in the various pilotage statutes. In our view, it precludes an enforcement action against appellant's Coast Guard license for negligence while piloting a foreign flag vessel in waters where a state has exercised jurisdiction over pilotage.

Since we have found in appellant's favor on the issue of the Coast Guard's lack of jurisdiction, the remaining contentions in his brief on appeal are not discussed.¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is granted;
2. The order of the Commandant affirming the probationary suspension of appellant's license under Authority of 46 U.S.C. 239 be and it hereby is reversed; and
3. The decision of the law judge and the Commandant herein be vacated and set aside.

KING, Chairman, DRIVER, Vice Chairman, GOLDMAN and BURSLEY, Members of the Board, concurred in the above opinion and order. McADAMS, Member, did not participate.

¹¹Dietz case, supra, at 1113.

¹²Agency actions falling beyond the purview of statutes granting its powers "are not merely erroneous, but are void" 73 C.J.S. Public Administratove Bodies and Procedure §59.